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Federal Pension Benefits: The Reach of Preemption

By Marsha N. Cohen*

John and Jane Doe have been married for thirty years; for the first twenty of those years John worked for a railroad. During the ten years since John retired from that job he has been receiving railroad retirement benefits. John and Jane have lived frugally since John’s retirement, paying all their living expenses from their income other than the retirement benefits.

John and Jane have invested John’s retirement benefits in stocks and real estate, and used some of it to make the down payment and monthly payments on a modest automobile. Although the stock and real estate investments were small when made, they are now valued at three to five times their cost.

John and Jane are now divorcing. Their only significant assets include John’s right to his retirement benefits, and the stock, real estate, and automobile purchased with the retirement benefits he has received. The United States Supreme Court ruling in *Hisquierdo v. Hisquierdo*, upholding federal preemption, prevents Jane from receiving any interest in John’s right to receive retirement benefits, regardless of her rights under state marital property law. The *Hisquierdo* Court did not determine the appropriate disposition of the car, the stock, and the real estate, all property purchased with the pension funds.

What if John and Jane’s assets came from other federal pension plans? The United States Supreme Court held in *McCarty v. McCarty* that under the doctrine of federal preemption states could not divide military retirement pay. Although the Supreme Court has not ruled on the issue, four California court of appeal cases are in agreement that

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2. The federal preemption doctrine emanates from the supremacy clause, article VI, clause 2, of the United States Constitution.
federal preemption precludes state court division of social security benefits. Congress has mitigated the probable preemption result in regard to social security by creating a legislative exception for marriages of ten years’ duration. In August 1982, Congress virtually negated the impact of McCarty by giving the states express permission to divide military retired pay in accordance with state marital property laws. The applicability of state marital property laws to other federal pension plans has either been upheld or has not become an issue.

The judicial pronouncements concerning preemption of the right


When the Hillerman case first reached the court of appeal, the court reached a contrary conclusion. On January 16, 1979, it held that the trial court should have retained jurisdiction to divide the social security benefits. 88 Cal. App. 3d 372, 151 Cal. Rptr. 764, 770 (1979), vacated, 109 Cal. App. 3d 334 (1980), reprinted in 6 COMM. PROP. J. 145 (1979). Hisquierdo was decided by the United States Supreme Court on January 22, 1979 and the court of appeal ordered its own opinion withdrawn from publication on February 9, 1979. 88 Cal. App. 3d 372. On April 12, 1979, the California Supreme Court granted a petition for hearing and retransferred the case to the court of appeal for consideration in light of Hisquierdo. 151 Cal. Rptr. 764 (1979).

Practitioners have generally viewed the right to receive social security as nondivisible, as reflected in the Hisquierdo case. Neither party claimed that Angela Hisquierdo’s expectation of receiving Social Security was community property and the superior court ruled that it was not. Hisquierdo v. Hisquierdo, 439 U.S. at 579. The issue was not raised on appeal. In re Marriage of Hisquierdo, 133 Cal. Rptr. 684 (1976).


7. There are 68 federal retirement plans, Ginzberg, The Social Security System, 246 SCI. AM. 51 (January 1982), of which the Civil Service Retirement System, 5 U.S.C. §§ 8301-8348 (1976 & Supp. 1V 1980), with 2,700,000 covered employees, is the largest. Women and Retirement Income Programs: Current Issues of Equity and Adequacy 52 (Subcomm. on Retirement Income and Employment, House Select Comm. on Aging, 96th Cong., 1st Sess. (1979)). Each is created by its own statute; the question of federal preemption of division of benefits by state law would need to be separately analyzed for each plan. There are similarities among the statutes setting up the various pension plans, and some of their features are shared by social security.

to future receipt of railroad retirement and social security benefits and of military retired pay are unequivocal. This Article therefore examines the *Hisquierdo* and *McCarty* decisions and the four California court of appeal cases concerning preemption of division of social security benefits to determine their application to assets existing at the time of divorce that were received from, or are traceable\(^8\) to, those federal sources. It concludes that the preemption of division of received railroad retirement and social security benefits does not automatically follow from the decided cases. Were the *McCarty* decision still effective, it would have been far more difficult to reach the same conclusion about received military retired pay. The legislation reversing *McCarty* requires amendment, however, to assure the full applicability of state law to received military retired pay. This Article analyzes the legislative reversal of *McCarty*, suggesting that congressional action should go further in clarifying the division of assets acquired with military retired pay and that legislation should now be passed to allow railroad retirement benefits and social security benefits to be fully divisible under state law.

Although *Hisquierdo* and *McCarty* both arose in California, a community property state, their doctrines affect property division in all states, regardless of the state’s marital property system. Thus this Article’s conclusions concerning the applicability of state law affect issues that might arise in any state.\(^9\) The final section of the Article focuses

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The Internal Revenue Service has ruled that no conflict exists between community property laws and the Civil Service Retirement Act and that, for purposes of income tax treatment, benefit payments thereunder should be considered community property to the extent earned during the marriage. Rev. Rul. 168, 1963-2 C.B. 9, 10. In the same set of rulings the IRS stated that community property treatment would also be accorded to military retired pay attributable to services performed when the married member of the Armed Forces was domiciled in a community property state. Rev. Rul. 169, 1963-2 C.B. 14. The IRS also indicated it would accord community property treatment for tax purposes to recipients of social security retirement benefits domiciled in community property states at the time they become entitled to receive the benefits. Rev. Rul. 167, 1963-2 C.B. 17.

8. Acquisitions during marriage in California are presumptively community property. A spouse may rebut this presumption by tracing the purchase price of an acquisition to an item of separate property. H. Verrall, *Cases and Materials on California Community Property* 147 (3d ed. 1977); see, e.g., Freese v. Hibernia Sav. & Loan Soc’y, 139 Cal. 392, 394, 73 P. 172, 173 (1903).

9. The Washington Supreme Court rejected an argument that community property states which render a “just and equitable” rather than “equal” division are not bound by *Hisquierdo*. In re Marriage of Larango, 93 Wash. 2d 460, 463, 610 P.2d 907, 908 (1980). Montana, a common law marital property state, also followed *Hisquierdo*, declaring that railroad retirement benefits could no longer be considered part of the “marital estate.” *In re*
narrowly on California law suggesting that states may have alternative bases for jurisdiction over assets that might otherwise be considered nondivisible under federal preemption analysis.

Background on Division of Federal Benefits

Litigation on the subject of marital rights and federal retirement benefits has focused upon the right of a nonemployed spouse\(^\text{10}\) to share future benefits from various federally provided pension systems. The value of that right is frequently considerable, justifying the expense of litigating the issue. In contrast, no court has seriously considered the divisibility of pension benefits already received from the three federal sources examined in this Article and still on hand at the time of divorce. Divorcing couples may well possess assets received as, or traceable to, social security or railroad retirement benefits or military retired...

\(^{10}\) For purposes of this Article, “nonemployed spouse” means that spouse who did not personally earn the pension in question, even if otherwise employed.
pay. In many cases the unused sums would be small. However, if those benefits were converted into property, stock or other assets which have appreciated in value, their division may be of considerable significance. 11

Division of marital property under community property systems has as its hallmark the recognition of the nonemployed spouse's interest in the financial gains of both spouses during the marriage. This recognition translates into laws in all the community property states, 12 requiring upon dissolution 13 equal 14 or equitable 15 division of the

11. A note on terminology: Both the courts (e.g., "if retired pay were community property," McCarty v. McCarty, 453 U.S. at 226) and the commentators (e.g., "So, the benefits earned by [the husband's] labor during marriage were his separate property," Reppy, Learning to Live with Hisquierdo, 6 COMM. PROP. J. 5, 7 (1979) [hereinafter cited as Reppy, Learning]) pose the issue of the treatment by the states of federal retirement benefits as a classification problem: whether the proceeds are the separate property of the employed spouse or the community property of both spouses. The issue is not, however, the classification of the asset, but the power of the state to grant the asset, regardless of its classification under state law, to someone other than the employee spouse, the intended beneficiary of the federal program.

Separate property in California is defined as "[p]roperty owned before marriage or acquired during marriage by gift, will, or inheritance." CAL. CONST. art. I, § 21; CAL. CIV. CODE §§ 5107-5108 (West Supp. 1981). All other property acquired during marriage is presumed to be community property. Property which is nondivisible under Hisquierdo and McCarty is therefore not separate property in the terminology of the California community property system, and should not be so called.

During the continued existence of the marriage, occasions may arise when the community classification of the asset is of some significance. The Internal Revenue Service may logically continue to accord community property treatment to income from these pension sources, notwithstanding that the source of income cannot be divided at divorce. See Rev. Rul. 169, 1963-2 C.B. 14. A conclusion that these sources are separate property in a community property system also has ramifications for the classification of the benefits once received. In sum, it is far more accurate, although verbose, to consider the right to receive railroad retirement benefits as a community property asset that cannot be divided between the spouses. See Reppy, Community and Separate Interests, supra note 7, at 508.


13. The community wealth must be divided upon dissolution of the community either by divorce or by the death of either spouse. Upon death, the relevant inquiry concerns the extent of property over which the decedent spouse has testamentary power. In California, under the "terminable interest" doctrine derived from Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972), overruled on other grounds, In re Marriage of Brown, 15 Cal. 3d 838, 851, 544 P.2d 561, 569, 126 Cal. Rptr. 633, 641 (1976), and Benson v. City of Los Angeles, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963), interests in retirement plans that are traceable to employment during marriage, although recognizably community property even if not yet vested, see In re Marriage of Brown, 15 Cal. 3d at 851-52, 544 P.2d at 569, 126 Cal. Rptr. at 642, may not be bequeathed by the nonemployee spouse. See generally, Reppy, Community and Separate Interests, supra note 7, at 443-82. The terminable interest doctrine has been applied to federally created pensions. In re Marriage of Fithian, 10 Cal. 3d 592, 599-600, 517 P.2d 449, 453-54, Ill Cal. Rptr. 369, 373-74, cert. denied, 419
wealth obtained through either spouse's labors\textsuperscript{16} during the marriage. The marital property laws of most non-community property states now also recognize the contributions of the nonemployed spouse to the family's earning capacity. In almost every state, the concept of equitable division has replaced both formalities of title and the working spouse's exclusive control of earnings as the basis for property division upon divorce.\textsuperscript{17}

For a division of assets to approach either equality or equity, whether in a community or non-community property system, all assets

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\textsuperscript{16}U.S. 825 (1974); \textit{In re} Marriage of Peterson, 41 Cal. App. 3d at 653-56, 115 Cal. Rptr. at 192-94 (1974); Bensing v. Bensing, 25 Cal. App. 3d 889, 893-94, 102 Cal. Rptr. 255, 257-58 (1972). All three cases were overruled on other grounds. \textit{In re} Marriage of Brown, 15 Cal. 3d at 851 n.14, 544 P.2d at 570 n.14, 126 Cal. Rptr. at 641 n.14. Upon death, the terminable interest doctrine applies to future pension benefits and it is unnecessary to consider whether federal preemption, this Article's primary concern, is an obstacle to full community property treatment of the assets at issue. The statute overruling \textit{McCarty} enacts the terminable interest doctrine, precluding former spouses from exerting testamentary power over their interest in their ex-spouses' military retired pay. Former Spouses' Act, \textit{supra} note 6, § 1002(c)(2), 96 Stat. 730, 732 (1982).

To the extent a decedent's estate includes assets traceable to federal pension benefits received during his or her lifetime, the terminable interest doctrine is not an obstacle to community property division. The classification analysis in this Article applies to division of assets in an estate as well as to division upon divorce. For ease of reference, however, this Article will refer only to dissolution by divorce, referred to simply as divorce.

\textsuperscript{17}Equal division is mandated in California, CAL. CIv. CODE § 4800 (West Supp. 1981), \textit{but see} exceptions, § 4800(b), (c); Louisiana, LA. CIv. CODE ANN. arts. 1290, 1308, 2336 (West 1973 & Supp. 1981), LA. CODE CIv. PROC. ANN. art. 82 (West 1960 & Supp. 1981); and New Mexico, N.M. STAT. ANN. § 40-4-7 (1978); Michelson v. Michelson, 86 N.M. 107, 520 P.2d 263 (1974) (the statutory requirement that division be "just and proper" held to mean equal).


Assets obtained during marriage through the exploitation of the "time, energy and skill" of either husband or wife are deemed to be community property. H. VERRALL, \textit{supra} note 8, at 4; \textit{see} W. REPPY & W. DEFUNIAK, \textit{supra} note 12, at 1. In California, a presumption favors the classification of property as belonging to the community estate rather than to the separate estate of either spouse. CAL. CIv. CODE § 5110 (West 1970 & Supp. 1981).

declared by a state to be within its marital property system must be available for division. Federal court decisions that remove entire categories of assets from that division preclude the effectuation of the property division policies of the states. The number of people affected is significant. The *Hisquierdo* decision continues to have an impact on a large number of people; *McCarty* would have affected many more if not legislatively reversed. Social security is the largest of all federal pension plans, so its status in regard to the applicability of state marital property laws has the greatest impact of all.

**Case Law on Division of Received Federal Benefits**

The United States Supreme Court’s decisions in *Hisquierdo* and *McCarty* unequivocally prohibited state division of future railroad retirement benefits and military retired pay in accordance with any state laws giving the nonemployee spouse a share of the employee’s entitlement. Although the Supreme Court has not ruled on the issue, California courts, which generally have upheld the applicability of community property concepts to other types of federal benefits, have concluded

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20. As of December 30, 1978, there were 18,357,755 recipients of old-age benefits nationwide under the Old Age, Survivors, and Disability Insurance (OASDI) program; 1,718,431 Californians receive these benefits. More than 34 million individuals were receiving benefits of all types under the OASDI programs. 1977-79 Social Security Bulletin, Annual Statistical Supplement, at 179.


that state law cannot be applied to future social security retirement benefits. Examination of these cases establishing the indivisibility of future benefits is necessary to determine whether their rationale also forecloses division of received assets from the same sources.

**Railroad Retirement Pensions: Hisquierdo v. Hisquierdo**

Railroad Retirement Act benefits, funded by employee and carrier contributions, were intended by Congress to encourage older railroad workers to retire by providing them with some financial security and, as a result, to provide new jobs and advancement for younger workers in the railroad industry. Spousal benefits terminating upon divorce are also provided for in the Act.

The Court in *Hisquierdo v. Hisquierdo* began its analysis of whether to grant Angela Hisquierdo an interest in her husband’s “expectation of ultimately receiving benefits” under the Act by restating that matters of domestic relations are under state control. When state family law conflicts with a federal statute, the court concluded that it has “limited review under the Supremacy Clause to a determination whether Congress has ‘positively required by direct enactment’ that state law be pre-empted.” Further, the Court stated that a “mere conflict in words” was not sufficient to override the state law; “[s]tate family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.” The Court’s preemption test for family law matters thus requires satisfaction of two conditions: first, a finding

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23. See supra note 4.
27. Id. at 573.
28. Id. at 581 (citation omitted).
29. Id. (citations omitted). It is interesting that all four prior cases in which the Court “has found it necessary to forestall . . . an injury to federal rights by state law based on community property concepts,” id. at 582, involved inheritance and survivorship rather than divorce. An argument can be made that because property division at divorce is more central to state control of domestic relations than property division at death, the most stringent test for preemption of state law should be reserved for the former. A less stringent test may in fact have been applied in the four cases cited by the Court.
of a positive requirement by direct enactment in federal legislation that
the state law be preempted, and second, a finding that the continued
application of state law would cause major harm to clear and substan-
tial federal interests.

The *Hisquierdo* Court proceeded to find such an express conflict
between section 231m of the Railroad Retirement Act, which prohibits
assignment, attachment and anticipation of benefits, and the wife's
right under California's community property system to share in that
portion of the pension earned during marriage. The consequence of
any division of the right to receive the pension would be impairment of
the financial security of the employee beneficiary. The result, the
Court explained, would discourage divorced employees from retiring,
fearing they would have to share their benefits. In fact, an incentive to
continue working would exist because income from the divorced rail-
road worker's continued labor would not be a marital acquisition, and
would thus be separate property. This result would frustrate a major
congressional purpose in providing the pension plan.

*Application of Hisquierdo to Received Benefits*

The *Hisquierdo* Court found that section 231m, the anti-attach-
ment clause of the Act, was a direct enactment of a positive require-
ment that state marital property law yield to federal law regarding
division of the future right to pension receipts. The Court concluded
that continued application of state law would harm the clear and sub-
stantial federal interests favoring orderly retirements in the railroad in-
dustry. To determine if a state may divide money already received

30. 45 U.S.C. § 231m (1976 and Supp. IV 1980) provides in pertinent part as follows:
"Notwithstanding any other law of the United States, or of any State, territory, or the Dis-
trict of Columbia, no annuity or supplemental annuity shall be assignable or be subject to
any tax or to garnishment, attachment, or other legal process under any circumstances what-
soever, nor shall the payment thereof be anticipated . . . ." See infra text accompanying
notes 33-34.

31. The Court held that this express conflict would exist even if Angela Hisquierdo
were granted community property other than the pension to offset the value of that asset and
make the equal division required under California law; an offsetting award would be an
anticipation of benefits forbidden by section 231m and "would upset the statutory balance
and impair petitioner's economic security just as surely as would a regular deduction from
his benefit check." *Hisquierdo* v. *Hisquierdo*, 439 U.S. at 588. See infra text accompanying
notes 44-46. The offset device was used in *In re Marriage of Milhan*, 13 Cal. 3d 129, 131,
circumvent the preemption problem posed by the court's inability to award the nonem-
ployee spouse any interest in the employee spouse's military life insurance policies.

32. *Hisquierdo* v. *Hisquierdo*, 439 U.S. at 585. If the worker remarried, the wealth
from continued labor would be a marital acquisition of the new marriage.
under the Railroad Retirement Act and on hand at the time of divorce, it is necessary to determine whether section 231m includes a positive requirement preempting state law in regard to this category of asset. In addition, to satisfy the second condition of the Court's preemption test, the continued division of this category of assets in accordance with state law must be found to harm clear and substantial federal interests.

Section 231m consists of two major prohibitory clauses, each with a somewhat different emphasis. The first clause prohibits assignment of the annuity, or its subjectection to garnishment, attachment, or other legal process. The second prohibits anticipation of the annuity.

When a state court at the time of divorce divides the right to a pension between husband and wife, the court has in a very real sense subjected that annuity to legal process. However, once an annuity payment has been received, it is unclear whether the anti-attachment clause continues to apply. Comparison of section 231m with section 407 of the Social Security Act, a similar anti-attachment clause, is helpful because its reach has been the subject of considerable litigation. The scope of the latter section is broader than its Railroad Retirement Act counterpart. It refers not just to the right to future payment, but also quite specifically to "moneys paid" as well as payable under the law. In contrast, the language of the Railroad Retirement Act anti-assignment clause seems targeted to protect the corpus of the annuity, rather than all funds flowing from it. Had Congress wished to protect Railroad Retirement Act benefits more fully from legal process, it could have used language of broader applicability similar to that of section 407.

Even if section 231m were found applicable to "moneys paid," like section 407, and thus to benefits on hand at the time of divorce, the

33. See supra note 30.

34. The Court rejected the argument that because Angela Hisquierdo was a co-owner of the pension under California community property law, section 231m would not apply. It reasoned that her inability to use legal process to protect her interest was a "severe limitation" on her ownership. 439 U.S. at 586 n.19. Furthermore, legislation overriding section 231m to allow garnishment for spousal support claims specifically precludes garnishment to effect property divisions between spouses. Id. at 587 & n.20. In contrast, civil service retirement benefits may be garnished for community property purposes. Id. at 590; see 5 U.S.C. § 8345(j),(1) (Supp. IV 1980), added, Pub. L. No. 95-366, 92 Stat. 600 (1978). See also supra note 7.

35. 42 U.S.C. § 407 (1976 and Supp. IV 1980) provides: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." See Reppy, Community and Separate Interests, supra note 7, at 533 n.416.
division of those assets between the spouses in accordance with state law still might not be precluded. If the assets are not "readily withdrawable," they may be beyond the protection of section 231m and subject to state law. In the leading case of *Philpott v. Essex County Welfare Board*, the United States Supreme Court held that section 407 imposes "a broad bar against the use of any legal process to reach all social security benefits." In that case the plaintiff county agency had provided financial assistance to Wilkes, a person eligible for, but not then receiving, disability insurance benefits under the Social Security Act. The board advised Wilkes to apply for such benefits, but, as a condition for receiving county assistance, Wilkes was required to execute an agreement reimbursing the county for all benefits received. A year later Wilkes received a check for retroactive disability insurance benefits and deposited it into a bank account held by Philpott as his trustee. The welfare board sued under the reimbursement agreement to reach the bank account.

The issue before the Court in *Philpott* was the effect of section 407 upon the state's right to reimbursement from Wilkes' account. The Court held that section 407 protects "moneys paid" as long as they are "readily withdrawable" and retain the quality of "moneys" in the form in which they are held. Therefore, the state was not entitled to reimbursement from the account. Similar protection has been ac-

37. *Id.* at 417.
38. A number of cases decided prior to *Philpott*, and one case decided after *Philpott* but neglecting to consider it, held that section 407 does not apply to moneys traceable to payments under the Social Security Act. These cases are no longer good law. *E.g.*, Owens v. Owens, 591 S.W.2d 57 (Mo. Ct. App. 1979); Texas Baptist Children's Home v. Corbitt, 321 S.W.2d 610 (Tex. Civ. App. 1959); Ponath v. Hedrick, 22 Wis. 2d 382, 126 N.W.2d 28 (1964).

It is unlikely that two state appellate court cases allowing wives' attachment requests against social security benefits, notwithstanding section 407, would survive serious scrutiny after *Hisquierdo*. These cases distinguished a wife from a creditor on the ground that the Social Security Act was enacted to protect her as a dependent as well as her husband, the prime beneficiary. Brown v. Brown, 32 Ohio App. 2d 139, 288 N.E.2d 852, 853 (1972) (husband restrained from negotiating social security check); Huskey v. Batts, 530 P.2d 1375 (Okla. Ct. App. 1974) (future disability benefits divided).


Commingling, as that term is used in community property parlance, see W. REFFY, *COMMUNITY PROPERTY IN CALIFORNIA: CASES, STATUTES, PROBLEMS* 117 (1980), does not eliminate section 407 protection if the social security moneys can be easily traced, are readily withdrawable, and are in a form that has the quality of "moneys." A social security recipient can lose the protection of section 407, on the other hand, even if the benefits remain uncommingled.
corded to money held in checking accounts, and to savings and loan deposits under analogous provisions of veterans' benefits law. This protection, however, has not been extended to negotiable notes, United States bonds, or other "permanent investments" such as land and buildings. The form in which received railroad retirement benefits are held at the time of divorce thus may determine whether or not those benefits are subject to division under state law.

The second clause of section 231m, prohibiting anticipation, seems factually inapplicable to money already received from the railroad retirement system. The Court's concern with this clause in Hisquierdo involved the remedy applied in the case of In re Marriage of Milhan. The Milhan court compensated the nonemployee spouse with an offsetting award of other community property equivalent in value to her interest in her husband's military life insurance policies. The Milhan remedy would give the nonemployee spouse assets equivalent to the actuarial value of the pension at the time of divorce. The Hisquierdo Court foresaw that the employee spouse would be seriously disadvantaged if Congress modified the pension law before benefits were received. Similarly, if the employee died or changed jobs the pension's value would change dramatically. However, the "obvious frustration

40. Anderson v. First Nat'l Bank, 151 Ga. App. 573, 260 S.E.2d 501 (1979); Household Finance Corp. v. Chase Manhattan Bank, 91 Misc. 2d 141, 397 N.Y.S.2d 564 (1977); see also Lawrence v. Shaw, 300 U.S 245 (1937) (taxation of veterans' benefits). The court in Anderson followed Philpott and refused to allow a judgment to be satisfied by garnishing a checking account containing judgment debtor O'Kelley's social security disability payments. The facts are unique. The plaintiffs were family members of O'Kelley's wife and mother-in-law, of whose murders O'Kelley was convicted and for which he was sentenced to two consecutive life sentences. The plaintiffs' unsatisfied judgment against O'Kelley arose from a civil suit for the deaths of the two women.


43. Trotter v. Tennessee, 290 U.S. 354, 356-57 (1933). Mr. Justice Douglas suggested that the test of exemption under section 407 should be "liquidity," which he felt could include stocks and bonds as well as savings accounts, depending upon the particular facts. Porter v. Aetna Casualty Co., 370 U.S. at 163-64 (Douglas, J., separate opinion).

The protection from attachment in section 407 has been held by one court as terminating upon the beneficiary's death. In re Estate of Vary, 401 Mich. 340, 352, 258 N.W.2d 11, 16 (1977). Applying this analysis to the railroad retirement and social security benefits on hand at the death of a beneficiary spouse, the surviving spouse could argue that the anti-attachment clauses do not prevent the application of state law marital property principles to those benefits regardless of the form in which they are held.


of congressional purpose” 46 which the Court feared would result in connection with an entitlement to future receipt of benefits would not occur if the money were already received and its value fixed and determinable.

It does not appear, then, that state laws dividing money received from Railroad Retirement Act annuities still on hand at the time of divorce would directly conflict with either prohibitory clause of section 231m of the Act. The first condition for preempting state marital law, a positive requirement of preemption by direct enactment, is thus not met with regard to received benefits.

It appears analytically unnecessary to consider whether the second condition of the Court's test for application of the supremacy clause is met, that is, whether the consequences of applying state law would “do 'major damage' to 'clear and substantial' federal interests.” 47 Nevertheless, if this second condition cannot be met, the conclusion that the states may divide received benefits in accordance with their marital property law is strengthened.

Accepting the Court's view of the injury resulting from division of future benefits, 48 some injury to federal interests admittedly would flow from division of received benefits. A major congressional objective in any pension program is providing for the financial needs and economic security of the intended beneficiaries. 49 Although application of state law to received benefits would in most cases have minor financial impact compared to division of future income from the pension, some diminution of the assets of the employee spouse would occur. However, such diminution usually will not be of sufficient magnitude to constitute the “major damage” required to preempt state law. 50

State jurisdiction over received benefits does not impair all congressional objectives for pension plans. Recipients of pension benefits have already made the decision to retire, a decision intentionally encouraged by the railroad retirement program. 51 Another objective is

46. Id.
47. Id. at 581.
48. See supra note 32 & accompanying text.
49. 439 U.S. at 583-86.
50. See id. at 581. The unusual case, in which assets of greatly appreciated value can be traced to money from pension benefits, should not be determinative of the application of the supremacy clause test. The question to be asked is whether the general application of state law in an area does major damage to the substantial federal interest, not whether in a particular case the application of state law leads to a result contrary to the federal interest. Id.
51. Id. at 585.
the targeting of benefits to the intended beneficiaries. The spouse of a 
retired worker covered by the Act is, until the time of divorce, an in-
tended beneficiary, provided for by the spousal benefits. The division 
of benefits received during the marriage, therefore, appears to be in 
harmony with this congressional goal.

Analysis of the Court’s rationale in Hisquierdo v. Hisquierdo indicates, then, that states may apply their marital property laws to re-
ceived benefits under the Railroad Retirement Act. One possible 
exception might occur when a recipient has maintained those benefits 
in a “readily withdrawable” form; this exception, however, would re-
quire an overly broad interpretation of the language of section 231m.

The Social Security Benefits

The social security system has been described as “a form of social 
insurance . . . whereby persons gainfully employed, and those who 
employ them, are taxed to permit the payment of benefits to the retired 
and disabled, and their dependents.” Although characterized as so-
cial insurance, social security also has “some of the attributes of . . . a 
private retirement plan.”

The taxes which fund benefits are based upon the employee’s earn-
ings. Eligibility for benefits is based upon completion of a certain 
number of “quarters” of covered employment. However, “[t]he amount of an employee’s ‘contribution’ or earnings does not necessarily

52. Id. at 584.
53. See supra text accompanying notes 36-43. Professor Reppy distinguishes future benefits from benefits on hand at divorce “on the theory that state law has no opportunity to attach and vest a community interest in the wife until the sums are paid out of the federal treasury.” He adds that “the tenor of the Hisquierdo opinion suggests the Court wanted [the wife] to have no community interest at any stage of the retirement plan process.” Reppy, Learning, supra note 11, at 7 n.4. This author’s reading of Hisquierdo does not yield this tenor. The Court carefully limits its opinion to the “expectation of ultimately receiving benefits,” Hisquierdo v. Hisquierdo, 439 U.S. at 573. The Court also stated that “[the] approach must be practical. The federal nature of the benefits does not by itself proscribe the entire field of state control,” id. at 583, indicating that the Court would carefully analyze the distinguishable issue of the application of the supremacy clause to received benefits.
57. A “quarter” is the basic unit of social security coverage, consisting of a quarter of a calendar year of employment or its designated equivalent. 20 C.F.R. § 404.140 (1982). See In re Marriage of Kelley, 64 Cal. App. 3d at 97, 134 Cal. Rptr. at 267, citing 1974 Social Security and Medicare Explained (CCH) §§ 504-506.
determine the quantum of his benefits.” The number of variables, including the marital status of the beneficiary, affect the total benefits received by the primary beneficiary and the derivative or family beneficiaries.

Division of Future Benefits: The California Cases

The United States Supreme Court has never considered whether the right to future social security benefits may be divided in accordance with state law, as it has with the right to future railroad retirement and military retirement benefits. However, the treatment by lower state courts of the division of future social security benefits provides some assistance in the analysis of the propriety of state division of received social security benefits.

A number of California cases have dealt with the division of the right to future social security benefits; four representative cases will be discussed here: In re Marriage of Hillerman, In re Marriage of Cohen, In re Marriage of Nizenkoff, and In re Marriage of Kelley. These decisions have all concluded that the right to future social security...
benefits cannot be divided as community property upon divorce. All four decisions are based in part upon the preemption of state law under the supremacy clause; three of the four decisions also rely on the absence of a contractual right to or a property interest in social security benefits.

preclude division of expected future benefits, but stated that "[i]n the instant case, the contested social security benefits were acquired during the marriage. The amount of benefits is currently ascertainable—$8,279. This is not a case where the court has divided some future, possible benefit, but is merely the parceling of a presently existing bank account comprised partially of worker's compensation and social security benefits." *Id.* at 331, 296 N.W.2d at 250. The decision does not clarify whether the social security benefits at issue were old age or disability benefits. See infra note 64.

Another court, while holding that a wife could not share in her husband's future social security benefits, recognized the distinction between future benefits and "benefits which had not only vested but for which payments had actually been made to husband, a totally different situation . . . ." Wisner v. Wisner, 129 Ariz. 333, 339 n.4, 631 P.2d 115, 121 n.4 (1981), distinguishing Guerrero v. Guerrero, 18 Ariz. App. 400, 502 P.2d 1077 (1972).

64. The four California cases under discussion all involved old age benefits, which essentially function as a retirement pension. An Arizona case concluded that received social security disability benefits are community property. Guerrero v. Guerrero, 18 Ariz. App. 400, 402, 502 P.2d 1077, 1079 (1972); see Reppy, *Community and Separate Interests,* supra note 7, at 536 n.427. Both types of benefits are part of OASDI, and a worker is insured for both by virtue of duration of "covered" employment. See supra text accompanying note 57.

Because the purposes of a disability and a retirement system are quite different, the Guerrero precedent is diminished in importance for this analysis. Insofar as disability payments take the place of wages, they are seen as community property. Guerrero v. Guerrero, 18 Ariz. App. at 402, 502 P.2d at 1079; *In re Marriage of Stenquist,* 21 Cal. 3d 779, 791, 582 P.2d 96, 103, 148 Cal. Rptr. 9, 16 (1978). Insofar as they are compensation for injuries, they should be considered equivalent to tort judgments. Distribution of tort recoveries by one spouse has raised difficult policy questions for courts and legislatures. See, e.g., CAL. CIV. CODE § 4800(c) (West Supp. 1981); H. VERRALL, supra note 8, at 300-05; W. REPPY, supra note 39, at 145-48.

65. The Kelley case refers also to distribution of OASDI "contributions," the amounts of FICA tax paid by the employee. 64 Cal. App. 3d at 96, 134 Cal. Rptr. at 267. The court had apparently considered, but rejected, reimbursement to the community of FICA contributions as an alternative to division of future benefits. See Reppy, *Community and Separate Interests,* supra note 7, at 535-36.


67. *In re Marriage of Cohen,* 105 Cal. App. 3d 836, 164 Cal. Rptr. 672 (1980); *In re Marriage of Nizenkoff,* 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1977); *In re Marriage of Kelley,* 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976). The Cohen decision relies primarily upon an anti-attachment argument, see infra text accompanying notes 82-86, but also discusses the absence-of-right argument made in Kelley and Nizenkoff.

68. This latter argument has its basis in Flemming v. Nestor, 363 U.S. 603 (1963), in which the United States Supreme Court upheld as constitutional a statute which terminated social security benefits payable to an alien deported for specified reasons. This statute, the Court held, did not deprive the plaintiff of an "accrued property right." *Id.* at 610. "[A] person covered by the Act," concluded the Court, "has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment." *Id.* at 611. Importantly, the Court followed this conclusion with the
Two of the four California cases holding that federal law preempts division of the right to future social security benefits in accordance with community property principles do so on the basis of general conflict between state and federal law. In re Marriage of Kelley referred to the specific benefits provided in the social security statutes for wives, divorced wives, widows, and surviving divorced wives. It concluded critical caveat that Congress is not therefore “free of all constitutional restraint” in modifying the statutory scheme; an employee covered by the Act is entitled to due process as protection against arbitrary governmental action. Id.

Due process protection means that although the government can “unilaterally repudiate the right” of a category of recipients, In re Marriage of Nizenkoff, 65 Cal. App. 3d at 138, 135 Cal. Rptr. at 190, it cannot deprive individual recipients of benefits without according them due process because their property interest is of “sufficient substance” to warrant that protection. Flemming v. Nestor, 363 U.S. at 611. Therefore, Flemming v. Nestor limits the scope of the individual’s interest in social security; it does not destroy it completely. It does not follow that because a governmentally granted benefit is statutorily subject to defeasance it loses its character as property or potential property—an earned expectancy, in Professor Reppy’s lexicon. Reppy, Community and Separate Interests, supra note 7, at 439-43. As one California court concluded, “The fact that Congress, in its discretion, may withdraw benefits at any time has no impact on the state’s ability to characterize them for its own purposes under local principles of property law.” In re Marriage of Hillerman, 109 Cal. App. 3d at 340, 167 Cal. Rptr. at 243, (citing In re Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974)); accord In re Marriage of Karlin, 24 Cal. App. 3d 25, 29-31, 101 Cal. Rptr. 240, 242-44 (1972) (military retired pay). Furthermore, a clause in the Social Security Act expressly reserves to Congress “[t]he right to alter, amend, or repeal any provision” of the Act. 42 U.S.C. § 1304 (1976). That clause offers necessary flexibility in the management of the program.

The Railroad Retirement Act does not include such a reservation of power to amend or repeal, but case law suggests such a power exists. See Reppy, Community and Separate Interests, supra note 7, at 497 n.282. In Hisquierdo, the court analogized to the reservation of this power in the Social Security Act. 439 U.S. at 575 & n.6. The military retired pay statutes do not include such a provision. However, “the Ninth Circuit recently rejected the argument that Congress’ alteration of the method by which retired pay is calculated deprived retired military personnel of property without due process of law.” Costello v. United States, 587 F.2d 424, 426 (9th Cir. 1978), cert. denied, 442 U.S. 929 (1979); see also McCarty v. McCarty, 453 U.S. at 223 n.15. Neither McCarty nor Hisquierdo referred to congressional power to modify retirement benefits to support their preemption conclusions.

69. 64 Cal. App. 3d 82, 134 Cal.Rptr. 259 (1976).

70. Before 1965, a divorced woman was entitled to derivative benefits only if she was the mother of the beneficiary’s child. 42 U.S.C. § 416(d), amended by Pub. L. No. 85-840, § 301(e), 72 Stat. 1028 (1958). The Act was then amended to provide for ex-wives of beneficiaries who had been married to the beneficiary for at least twenty years. Social Security Act of 1937, amended by Pub. L. No. 89-97, § 308(c), 79 Stat. 377 (1965). In 1977 the length of the marriage to qualify under this provision was reduced to 10 years. 42 U.S.C. § 416(d) (1976 & Supp. IV 1980), amended by Pub. L. No. 95-216, § 337(a), 91 Stat. 1548 (1977).

The statute does not provide for ex-husbands. Gender-based distinctions in other sections of the Social Security Act have been held unconstitutional. Califano v. Goldfarb, 430 U.S. 199 (1977) (widowers, but not widows, required to prove actual support to receive dependent benefits); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (benefits provided for mothers but not fathers). A similar challenge on behalf of an otherwise qualifying ex-hus-
that "[i]f all or any part of OASDI contributions or benefits are included in the mix of community property divisible on dissolution of marriage, what is a uniform federal scheme of benefits becomes one that varies depending upon the community property law of various states." 71

The court in In re Marriage of Nizenkoff 72 more fully analyzed the problem. Referring to the specific amendments to the Social Security Act providing for divorced wives, the court stated that because "Congress expressly provided for the interests of a divorced wife in the social security system, it did not intend that they [sic] rely on state family law concepts of support, alimony and community property." 73 The Nizenkoff court found the necessary interference with the social security system in the mere existence of the provision for ex-spouses, concluding that "[a] ruling that social security benefits are divisible community assets would seriously interfere with the express statutory scheme of the Social Security Act. . . ." 74 Yet Nizenkoff does not explain, nor do the other cited cases, why the specific provision made for divorced wives of ten-year marriages precludes the states from applying their marital property laws to afford additional protection to these women.

In re Marriage of Hillerman 75 analyzed the preemption issue in...
greater depth. Citing authority relied upon in *Hisquierdo,* the court referred to the need to find a "'clear and manifest' purpose of Congress" to oust state law, and "an 'actual conflict' between the state and federal law . . . which does 'major damage' to the 'clear and substantial' governmental interests involved in the federal scheme." The family benefit scheme of OASDI, the court explained, "suggest[s] to us the presence of a . . . congressional intent to replace state family law as it applies to Social Security." The *Hillerman* court then posed various hypothetical problems in defining community interests of husbands and wives in Old Age, Survivors, and Disability Insurance (OASDI) benefits. Resulting complications and absurdities led the court to conclude that Congress must have intended to designate OASDI beneficiaries exclusive of any state domestic law.

*In re Marriage of Cohen* reviewed the *Kelley* and *Nizenkoff* decisions, merely reiterating their rationale on the preemption issue. More important to the court, though, was the *Hisquierdo* decision, which followed *Kelley* and *Nizenkoff*, and its emphasis on the anti-attachment

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77. 109 Cal. App. 3d at 341, 167 Cal. Rptr. at 244.
78. *Id.* at 342, 167 Cal. Rptr. at 244 (citations omitted).
79. *Id.* at 343, 167 Cal. Rptr. at 245.
80. Some of the problems posed were: Would the right to the benefits be based upon the marital status of the primary beneficiary throughout his or her total years of covered employment? Or would the right be determined solely on the basis of the final 10 years of employment, upon which benefits are based? *Id.* at 344, 167 Cal. Rptr. at 245-46. See Reppy, *Community and Separate Interests,* supra note 7, at 527-40, for a discussion of remedial problems in division of OASDI benefits.


81. *In re Marriage of Hillerman,* 109 Cal. App. 3d at 344, 167 Cal. Rptr. at 245. A problem preliminary to dividing either future or received benefits is establishing that they are the fruits of the employed spouse's labor during marriage. If the couple was married throughout the working life of the employed spouse, and benefits are already being received, there is no problem. But difficult apportionment problems arise when the employee was married for only part of his or her working life, or if the employee continues to work after divorce. For a lengthy discussion see Reppy, *Community and Separate Interests,* supra note 7, at 529-40; *see also* *In re Marriage of Hillerman,* 109 Cal. App. 3d at 341, 167 Cal. Rptr. at 243.

82. 105 Cal. App. 3d 836, 164 Cal. Rptr. 672 (1980).
clause of the Railroad Retirement Act. Referring to the Social Security Act’s anti-attachment clause, section 407, the Cohen court concluded that “[t]he rationale supporting the federal Hisquierdo decision appears equally applicable to social security benefits . . . .”

None of the other three California social security cases even mentioned section 407 as a barrier to state law division of benefits, even though it is a serious obstacle to all state court division of future social security benefits. However, the case law indicates that section 407 would preclude state law division of received benefits—“moneys paid,” in statutory terminology—only to the extent they are held in a form that is “readily withdrawable” and that retains the quality of money.

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83. Id. at 842, 164 Cal. Rptr. at 675.
84. See supra note 35.
85. 105 Cal. App. 3d at 842-43, 164 Cal. Rptr. at 676.
86. See supra text accompanying notes 35-43. The briefs of counsel in these cases do not reflect the potentially determinative impact of section 407. Neither party in In re Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976), even referred to the section.

Theodore Nizenkoff, desiring a share in his wife’s future social security benefits, argued that he was a co-owner, not a creditor, and that § 407, which he quoted, would therefore not bar the desired relief. He tried to distinguish Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973), without success. Brief for Appellant, at 13-14, In re Marriage of Nizenkoff, 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1977). In her brief, Desi Marie Nizenkoff never mentioned § 407, thus ignoring what could have been a strong argument. Instead, she argued that future social security benefits are not “property” subject to division, citing Fleming v. Nestor, 363 U.S. 603 (1963), and that the provision made in the statute for divorced spouses manifested congressional intent not to subject social security benefits to disposition under state marital property laws. Brief for Respondent at 3-8.

After In re Marriage of Hillerman, 109 Cal. App. 3d 334, 167 Cal. Rptr. 240 (1980), was retransferred for consideration in light of Hisquierdo, see supra note 4, the parties filed supplemental briefs. Tyna Hillerman’s brief began by recognizing that the Hisquierdo decision “placed considerable emphasis on the anti-attachment and anti-anticipation clause contained in § 231m of the Railroad Retirement Act . . . .” Second Supplemental Brief for Appellant, at 4. However, she continued, “[i]t must be noted that unlike the Railroad Retirement Act, the Social Security Act does not contain an anti-anticipation clause. Secondly, while both the Social Security Act and the Railroad Retirement Act contain an anti-assignment clause, the congressional purpose underlying the Railroad Retirement Act’s anti-assignment clause differs substantially from that of the Social Security Act.” Id. Thus, she argued, § 231m was intended to encourage retirement, whereas the Social Security Act’s objectives were quite different. She concluded that Hisquierdo’s reasoning and result were “not applicable to the anti-assignment clause contained in the Social Security Act.” Id. at 5. She never referred specifically to § 407, and never dealt with its exemption of benefits from “legal process.”

The briefs in In re Marriage of Cohen, 105 Cal. App. 3d 836, 164 Cal. Rptr. 672 (1980), dealt directly with § 407. Petitioner Sheila Cohen attempted to distinguish § 407 from section § 231m of the Railroad Retirement Act, but only on the basis that the former lacks the anti-anticipation language of the latter. She argued that the court was free to award her a monetary benefit based on the expected value of Philip’s future social security benefits or, in the alternative, to order Philip to pay her an appropriate share of those benefits when received. Brief for Appellant, at 16-17. Surprisingly, Philip Cohen’s brief failed to
Probable United States Supreme Court Treatment of Received Social Security Benefits

In light of Hisquierdo and McCarty, it seems likely that the United States Supreme Court would adopt the position of the California cases and conclude that state division of future social security benefits is preempted by federal law. But the arguments supporting the preemption result may not apply to received benefits possessed at the time of divorce.

The more cogent of the two arguments of the California cases for preemption in regard to future benefits, that exclusive provision was made for divorced wives in the Social Security Act, is factually inapplicable to division of received benefits. It is possible to infer that the specific provision for divorced wives was meant to be exclusive, ousting the states of the authority otherwise to divide the right to future benefits upon divorce. But this statutory provision implies nothing about the division of existing marital assets, even if they are traceable to social security payments.

Furthermore, there is a serious practical obstacle to assuring that all received benefits on hand at divorce go to the beneficiary spouse. To reach this result, the state courts, at the time of divorce, would need to engage in extensive tracing to untangle the social security funds from other marital property with which they may have been commingled. To untangle "federal" from "state" divisible assets would require confronting all the situations that have vexed the courts in community property states in dividing separate from community property. For example, courts would need to determine whether increases in asset value are assignable to the investment of social security dollars or of other capital, or to the labor applied to the capital investment.

Because disentanglement would be required by federal command, some sort of "federal common law" tracing would be preferable to fifty different state systems. However, the decisions would be made by state
trial courts, and federal appellate supervision would be unlikely. Each state, if prevented from dividing received benefits in accordance with its marital property law, would need to develop law to untangle those benefits from other marital property,\textsuperscript{91} resulting in different enforcement of the federal law from state to state.

Concern for the practicalities of division was a second reason that the \textit{Nizenkoff} court held that future benefits could not be divided in accordance with state marital property principles. The "complexity" rationale for preemption, however, cannot be applied to the issue of received benefits. Whether the state divides those benefits along with the other marital property in accordance with state principles, or distributes them to the beneficiary spouse, it must tackle the problem of assets of mixed origin. Congress could not have meant, solely by adopting the family benefit provisions, to impose this additional task of isolating federal property on the state courts without offering any guidance as to how it should be accomplished.

Although the social security cases may offer convincing arguments for precluding state law division of future benefits, their rationale is not convincing in relation to received benefits. The social security anti-attachment provision, however, would prevent state division of received benefits held in a readily withdrawable form, including, for example, uncommingled bank accounts in the social security recipient's name. The theoretical right to a division under state marital property law of assets traceable to social security, therefore, will be worth more or less to any particular spouse of a social security beneficiary depending upon the form in which the assets are held.

\textbf{Military Retired Pay: McCarty v. McCarty}

The existing system of military nondisability retired pay, funded solely by congressional appropriations, was adopted for a number of reasons relating to military personnel management. These include encouragement of retirement by officers no longer fit for wartime service, inducement of enlistments and reenlistments, and provision of income for persons who served in the armed forces.\textsuperscript{92} Receipt of military retired pay terminates at the death of the service member; payments ow-

\textsuperscript{91} Noting that "federal preemption of marital property principles is disfavored," Professor Reppy suggests "[o]ne reason for the Court's hesitancy to find that an Act of Congress preempts state marital property law is the absence of a developed federal system to fill the void created if state law is not applied." Reppy, \textit{Community and Separate Interests}, supra note 7, at 483-84, 508-09.

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ing at that time are made to the member's designated beneficiary.93 No spousal benefits are included in the plan.94 The military member may elect to participate in a plan in which the amount of retired pay is reduced to fund an annuity payable at his or her death to a surviving spouse or child.95

The Supreme Court prohibited state court division of future receipt of military retired pay in McCarty v. McCarty.96 While citing extensively from Hisquierdo for the principles underlying federal preemption of state family law, the McCarty Court in fact applied a less stringent test for preemption.97 Instead of a direct enactment of a positive requirement that state law yield to federal law, the McCarty Court required only that the state law conflict with the express terms of the federal law, appearing to omit the need to find any direct indication of a Congressional desire to preempt state law.98 And it required only that the consequences of applying state law sufficiently injure federal objectives to require nonrecognition rather than conditioning preemption upon a finding that continued application of state law would do major damage to clear and substantial federal interests.99 Whereas the Hisquierdo analysis was specific and focused primarily on section 231m, the anti-attachment clause of the Railroad Retirement Act,100 the McCarty Court's main theme was the general one that military retired pay is the personal entitlement of the service member. The basis for the Court's focus was 10 U.S.C. § 3929, which broadly states: "A member of the Army retired under this chapter is entitled to retired pay...

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93. Id. at 215.
94. Id. at 224. But see infra text accompanying notes 103-07.
95. The Retired Serviceman's Family Protection Plan and the Survivor Benefit Plan are described in McCarty, 453 U.S. at 215-16.
97. Id. at 220-21 (citing Hisquierdo v. Hisquierdo, 439 U.S. at 583). The Court in McCarty chose to focus on the second formulation of the test in the Hisquierdo opinion, 439 U.S. at 583, neglecting the earlier formulation, 439 U.S. at 581. It is not the purpose of this Article to offer a critique of McCarty or Hisquierdo; dissenting opinions do so in both cases. The McCarty dissent is particularly effective in pointing out difficulties in the majority opinion. See also Reppy, Community and Separate Interests, supra note 7; Young, Supreme Court Report, 65 A.B.A. J. 448, 452-53 (1979); Note, Community Property-Benefits Awarded Under the Railroad Retirement Act Are Not Community Property Subject to Division upon Divorce, 11 St. Mary's L.J. 535 (1979).
98. 453 U.S. at 221.
99. Id. at 221.
100. See supra notes 30-31 & accompanying text.
101. 453 U.S. at 224. The Court refers to the Army's retirement system as typical, "[s]ince each of the military services has substantially the same nondisability retirement system." Id. at 213. The centrality of the "personal entitlement" concept was predicted in...
The Court found further support for the centrality of the "personal entitlement" concept to the military retired pay scheme in the member's right to name a beneficiary other than a spouse to receive any unpaid arrearages of the retired pay upon the member's death, in the lack of any legislative provision for a retired service member's spouse, and in the exclusive right of the service member to choose to participate in survivor annuity plans. Further, it relied upon the anti-attachment provisions of the law governing military retired pay.102

Legislative Repudiation of McCarty

The United States Congress adopted the Uniformed Services Former Spouses' Protection Act103 on August 16, 1982, in direct response to the McCarty holding. This new statute allows state courts to treat military retired pay in accordance with state marital property law.104 This abrogation of federal preemption becomes effective February 1, 1983.105 The right to receive pension benefits of all military couples who divorce in the future will be subject to disposition under state law.106 Although Congress appears to have intended a complete repudiation of McCarty, it did not fully accomplish that result. Because the state courts have disposition power only over retired pay which is payable to a service member for pay periods beginning after June 25, 1981,107 the date of the McCarty decision, the status of military retired pay that was received prior to that date, and that is still available for disposition among the assets of couples who divorce in the future, is not specifically clarified by the statute. The classification of such assets will need to be determined with reference to the McCarty decision.

Application of McCarty to Received Benefits

The McCarty preemption analysis may well apply to received as


102. 453 U.S. at 224-30.

103. Former Spouses' Act, supra note 6.

104. The Former Spouses' Act, supra note 6, § 1002(c) provides in pertinent part as follows: "[A] court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."


106. The statute also provides other benefits to former spouses, such as the right to be the beneficiary of an annuity under the Survivor Benefit Plan, id. § 1008, 96 Stat. 730, 735, and medical benefits and commissary and post exchange privileges (limited to former spouses of marriages of 20 years' duration), id. §§ 1004-05, 96 Stat. 730, 737.

107. See supra note 104.
well as future benefits. First, unlike the *Hisquierdo* Court, which focused its opinion clearly on the "expectation of ultimately receiving benefits," the *McCarty* Court ambiguously stated the issue before it more broadly as whether "federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws." Second, the Court itself recognized that the sweep of its opinion may have required preemption of division of military pay in all its aspects, including active duty pay. Third, the Court's analytical base, the statutory term "personal entitlement," is so broad that it allows no escape from the preemption result. Undoubtedly any division of any funds derived from or traceable to military retired pay, resulting in their diversion from the service member to his or her ex-spouse, detracts from the member's "personal entitlement." Consequently, changing the facts of the case to question the division of received rather than future retired pay would not likely have changed the result.

Some counterarguments would be available. The indicia of congressional concern for personal entitlement are weaker in the context of received than future benefits. For example, arguments concerning the anti-attachment aspects of the military retired pay statutes are as inapposite to benefits in hand as are the parallel arguments in *Hisquierdo* concerning Railroad Retirement Act benefits. Furthermore, Supreme Court precedent indicates that although military pay cannot

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110. The majority stated, "we do not decide today whether California may treat active duty pay as community property." *Id.* at 225 n.17; see *id.* at 241 n.2 (Rehnquist, J., dissenting).
111. *Id.* at 224, citing S. REP. No. 1480, 90th Cong., 2d Sess. 6 (1968).
112. Several legislative changes relied upon in *McCarty* as support for the Court's preemption analysis based upon "personal entitlement" are unimportant in the context of received military retired pay. The Court cited Congress' decision to subject federal benefits to legal process to enforce child support and alimony obligations, but not to comply with property distribution decrees. *Id.* at 230. This statutory modification is irrelevant to received benefits to the extent that the anti-attachment provisions are not an obstacle to state division of received military retired pay. See *supra* text accompanying notes 35-43.

Congress, the Court noted, has authorized or recognized equitable distribution of the right to future pension receipts under civil service and foreign service retirement laws, see *supra* note 34, while failing to enact similar legislation concerning military retired pay, 453 U.S. at 230-33. These developments reflect congressional views concerning division of future pension benefits, but not of benefits already received. The policy concerns can be significantly different in regard to these two sets of issues, see *supra* text accompanying notes 49-52 & *infra* notes 119-24.

113. *See supra* text accompanying notes 35-43.
"be attached so long as it [is] in the Government's hands," once it leaves the government's hands the protection apparently does not apply.115

If the McCarty Court found "a conflict between the terms of the federal retirement statutes and the community property right"116 to divide received military retirement benefits simply because some terms of the military retired pay statutes are contrary to principles of equitable division by community property or other states,117 it would undoubtedly rule that any state control over military retired pay is preempted.118 There is a second prong to the preemption test, however, to be considered: whether application of state law would "sufficiently injure the objectives of the federal program to require nonrecognition." Admittedly, division of received military retirement benefits, like division of received Railroad Retirement Act benefits, would somewhat diminish the assets available to the retiree at divorce, thus partially frustrating the objective of providing for the retired service member. However, as would be the case under Hisquierdo, it is unlikely that the diminution would constitute the required "grave harm" to this federal interest.121

The other stated congressional objective of the retired pay statute is "meet[ing] the personnel management needs of the active military forces."122 Division of received military retired pay at divorce will not affect inducement to retire, because the persons affected have already retired. The Court's argument based upon the inability of military personnel to choose their state of residence123 is a cogent one, but only when active duty personnel are under discussion. Persons who have military retired pay on hand at divorce are already retired from active

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117. See supra notes 14-15 & 17.
118. Under this mode of analysis it is difficult to distinguish active duty pay. See supra text accompanying note 110. See also Comment, McCarty v. McCarty and Military Retired Pay: Avoiding the Test for Federal Preemption of State Community Property Law and the Problem of Unconstitutional Taking, 16 U.S.F. L. Rev. 377, 390 (1982).
120. Id. at 233.
121. Id. See supra text accompanying notes 48-52.
122. 453 U.S. at 232-33.
123. Id. at 234.
124. This issue is directly relevant to the applicability of state marital property law to active duty pay. See supra note 110. In practical terms it is extremely unlikely that very
duty and are free to choose their place of residence. It is possible, albeit theoretical,\textsuperscript{125} that division may have considerably greater impact on the stated objectives of enlistment and re-enlistment if military personnel believe that their level of retirement benefits would be diminished by a required division. But this argument lacks any weight in light of the recent congressional action granting states authority to divide all rights to retired pay. The conference committee report on the new law specifically noted that “there is insufficient evidence to evaluate the contention that returning to the states the authority to divide military retired pay would have a detrimental impact on retention.”\textsuperscript{126}

The Court's approach to the preemption issue in \textit{McCarty} points to an application of the doctrine broad enough to encompass benefits received before June 26, 1981, about which Congress has not spoken, as well as future benefits, as to which the decision is no longer applicable. Now that Congress has obviously determined that application of state marital property law to military retired pay would not sufficiently injure military objectives to require preemption, it would be ironic for courts to continue to apply a preemption analysis reliant on a contrary legislative belief. Congress' recent action in regard to military retired pay\textsuperscript{127} evidences its recognition that maintaining rules contrary to state law for federal benefit division conflicts with the generally accepted norm of equitable division between divorcing spouses of assets earned during marriage.\textsuperscript{128} Congressional action, however, has not gone far enough. Railroad retirement benefits are still not divisible,\textsuperscript{129} and the divisibility of social security benefits depends upon the duration of one's marriage.\textsuperscript{130} Furthermore, the division of pension benefits from these sources which are still on hand at the time of divorce remains problematical. Under the current federal legislative scheme, the disposition of received assets from federal benefit plans may depend on the ability to circumvent the preemption problem. The next section of this Article examines some ways states may be able to divide such assets, using California law as a basis for analysis.

\begin{footnotesize}

\begin{enumerate}
\item The Court itself recognized that “the extent to which the military retirement system actually accomplishes [personnel management] goals” is in question. 453 U.S. at 234 n.26.
\item Former Spouses' Act, \textit{supra} note 6.
\item See \textit{supra} notes 14-15 & 17.
\item See \textit{supra} note 5 & accompanying text.
\end{enumerate}

\end{footnotesize}
Alternative Bases for State Jurisdiction Over Received Benefits

Alternative arguments for the division of received pension benefits, circumventing the preemption problem, may be based upon state law. For example, the protected character of the assets in question may have been modified under generally accepted principles of state property and marital property law, making their division in accordance with that law appropriate. Doctrines to be examined in this regard include transmutation, gift, and presumptions from form of title.

Transmutation

In California, an "easy" transmutation state,131 it may be possible to demonstrate that the employee spouse beneficiary of federal pension benefits has intentionally transmuted received benefit payments132 from their form as nondivisible community property to true divisible community property, subject to equal division upon divorce. Even received benefits retaining the quality of money and in a readily withdrawable form—nonassignable133—may be transmuted.

Transmutation may occur by contract, oral as well as written; by gift; or by actions of a spouse that fall into neither category, as when one spouse has told the other that the money received from, for example, social security, would be "theirs" to enjoy.134 Although obtaining convincing proof of oral transmutations will be difficult, some courts have been easily satisfied by evidence merely of declarations that certain property is "ours."135

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131. W. REPPY, supra note 39, at 39. Transmutation is the term used in community property law to describe changes in the classification of marital property from separate to community and vice versa by transactions, often quite informal, between husband and wife. Id. at 29.

132. These same arguments can be applied to demonstrate transmutation of the right to receive future benefit payments as well. Id. at 29; cf. Wren v. Wren, 100 Cal. 276, 34 P. 775 (1893) (transmutation of future earnings to separate property).

133. See supra text accompanying notes 35-43 & 86.

134. W. REPPY, supra note 39, at 29.

Gift

The federal benefits in question are community property under California law, although federal preemption makes them nondivisible, like separate property. Therefore, the courts will probably require evidence of donative intent by the employee spouse to conclude that a gift transmutation has occurred. Evidence that received benefits from federal sources have regularly been used for community purposes should help to prove the employee spouse's intent in regard to their classification.137

Form of Title

Close examination should also be made of the form of title in which pension receipts are held at the time of divorce. Although title generally has not been considered a controlling classification in California community property law, recent case law makes rebutting certain forms of shared ownership title at the time of dissolution very difficult.139

Joint tenancy title has long been considered to be an indication of a couple's intent to hold property as true joint tenants with equal separate property interests, and many couples hold much of their wealth, including both real estate and bank accounts, in joint tenancy form. Rebuttal of the presumption that joint tenancy property is equally owned separate property requires proof of a mutual agreement or understanding of the parties to the contrary.142

The California Supreme Court recently made clear in In re Mar-

136. See supra note 11.
137. This principle does not apply when the money received from federal sources was required to be spent on necessities. In California, spouses have an obligation of mutual support that requires use of separate property—and, by extension, nondivisible community property—to purchase necessities of life. CAL. CIV. CODE § 5132 (West Supp. 1981). Use of federal pension benefits for necessities therefore would not demonstrate an intent to transmute.
138. With few exceptions, "characterization of property as community or separate depends not on the 'title' . . . but on the source of the acquisition." W. REPPY, supra note 39, at 39.
139. See infra text accompanying notes 142-44.
140. Bruch, supra note 21, at 830 n.238.
141. A 1961 study showed that more than half of the real property deeds recorded in California are to husbands or wives or both. Of these, 85% are held by husband and wife as joint tenants. Mills, Community Joint Tenancy—A Paradoxical Problem in Estate Administration, 49 CAL. ST. B.J. 38, 40 n.3 (1974).
riage of Lucas\textsuperscript{143} that tracing would not rebut the presumption of equal ownership arising from a joint tenancy title.\textsuperscript{144} Tracing to a nondivisible community property source such as a federal pension should also be disallowed under the Lucas principle.

While joint tenancy property cannot be divided upon divorce in California,\textsuperscript{145} when the joint tenancy is severed, the property will be equally divided between the parties.\textsuperscript{146} Therefore, when received federal benefits are held in joint tenancy, they should be equally divided between the joint tenants (although not by a divorce court), thereby achieving the same result as application of the California community property law. In essence, received benefits that under federal law are not subject to division may be considered as having been transmuted by the parties into equally owned separate property because the benefits, or assets purchased with them, were placed into a joint tenancy title.\textsuperscript{147}

\textsuperscript{143} 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

\textsuperscript{144} In Lucas, the Court refused to trace the contribution made from one spouse's separate property. Id. at 815, 614 P.2d at 288-89, 166 Cal. Rptr. at 857.


\textsuperscript{147} Even though the Lucas principle may usefully be applied to avoid preemption in certain situations, this author does not applaud its rationale. Brenda and Gerald Lucas took title to residential real estate as "husband and wife as joint tenants." They were not allowed to overcome the presumption arising from the form of title except "by evidence of an agreement or understanding between the parties that the interests were to be otherwise" than as stated in the title document. 27 Cal. 3d at 813, 614 P.2d at 287, 166 Cal. Rptr. at 856. Since no such evidence existed, the down payment that Brenda Lucas made from her separate property was given no credit; the property was equally divided between Brenda and Gerald. The down payment had been $6,351.57; the loan had been reduced by approximately $2,348 by community property payments at the time of trial.

The presumption that arises in California from a joint tenancy title to residential real estate at the time of divorce is not joint tenancy, but rather community property, by operation of law. CAL. CIV. CODE § 5110 (West Supp. 1982). The California Legislature created this special presumption to allow divorce courts to award the family residence to a spouse retaining custody of minor children; joint tenancy holdings, as separate property, are otherwise not within the divorce court's jurisdiction. 1965 Cal. Stat. 1710.

The legislature recognized that husbands and wives "take property in joint tenancy without legal counsel . . . they don't know what joint tenancy is . . . ." \textit{Final Report of Cal. Assembly Interim Comm. on Judiciary Relating to Domestic Relations 1965} Sess. at 124 (\textit{cited in In re Marriage of Lucas}, 27 Cal. 3d at 814, 614 P.2d at 288, 166 Cal. Rptr. at 856.) Yet the court, while acknowledging the general ignorance of the implications
A California court of appeal case, *In re Marriage of Cademartori*, 148 recently extended the *Lucas* holding to “all express designations of ownership.” 149 The presumption arising from any choice of title “could be overcome only by evidence of a common understanding or agreement.” 150 Therefore, using received federal benefits from any source to purchase property in which title is taken in a shared ownership form may result in a transmutation that will permit the application of state law classification principles to property that would otherwise not be divisible because of federal preemption. 151

The United States Supreme Court might view this result as a ruse to avoid preemption and therefore reject it. However, this approach is distinguishable from the California Supreme Court’s attempt to avoid preemption in *In re Marriage of Milhan*, 152 disapproved by the United States Supreme Court in *Hisquierdo*. 153 In *Milhan*, the California Supreme Court would have given an undivided amount of community assets to the nonemployee spouse equal to the value of the military benefits to compensate for the nondivisible asset. This result in essence would allow the nonemployee spouse to share indirectly the value of the nondivisible asset.

In contrast, the recognition of a transmutation as described above simply allows husband and wife to deal with the employee’s federal benefits as they see fit. By forbidding transmutations, which are recog-
nized by state law, the United States Supreme Court would be restraining voluntary alienation of the pension receipts, a suspect result.\textsuperscript{154}

However, the United States Supreme Court's decision in \textit{Ridgway v. Ridgway}\textsuperscript{155} is problematical. Richard Ridgway was a career Army sergeant whose life was insured under the Servicemen's Group Life Insurance Act (SGLIA).\textsuperscript{156} Under this act, a military service member has the right to designate and change the beneficiary of the insurance policy.\textsuperscript{157} When the couple was divorced, the state court's judgment, following property settlement negotiations,\textsuperscript{158} ordered Richard "to keep in force the life insurance policies on his life now outstanding for the benefit of the parties' three children."\textsuperscript{159} Four months following the divorce, and after remarrying, Richard Ridgway changed the beneficiary clause so that its proceeds would be "paid as specified 'by law.'"\textsuperscript{160} He died a year later, and both his first wife, on behalf of the children of their marriage, and the second wife claimed the proceeds.

The Supreme Judicial Court of Maine ordered the superior court to impose a constructive trust on the policy proceeds for the benefit of the children. The United States Supreme Court reversed, finding that the result was preempted by federal law. Ridgway's "absolute right to designate the policy beneficiary"\textsuperscript{161} was cited to support the Court's result. "It is not a shared asset subject to the interests of another, as is community property."\textsuperscript{162} Furthermore, the Court stated, the imposition of a constructive trust over the proceeds would be inconsistent with the anti-attachment provision of the SGLIA. "We find nothing to indicate that Congress intended to exempt claims based on property settlement agreements from the strong language of the anti-attachment

\textsuperscript{154} See Restatement of Property, § 405, comment a (1944); cf. 6 Powell, \textit{The Law of Real Property} §844 (P. Rohan ed. 1981).
\textsuperscript{155} 454 U.S. 46 (1981).
\textsuperscript{156} Id. at 48. The SGLIA is described id. at 50-53.
\textsuperscript{157} An earlier case, Wissner v. Wissner, 338 U.S. 655 (1950), established that the service member may designate and change beneficiaries free of any community property claims of a spouse to a share in the policy proceeds.
\textsuperscript{158} The opinions are in conflict on the status of the divorce court's judgment in this regard. The majority opinion stated that the divorce court judgment was "apparently following property settlement negotiations," 454 U.S. at 48; later in its discussion the majority referred to "property settlement agreements." Id. at 61. Justice Powell, dissenting, stated that the decree "incorporate[d] the agreement of the parties." Id. at 66.
\textsuperscript{159} 454 U.S. at 48.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 59.
\textsuperscript{162} Id. at 60.
The Court's analysis in *Ridgway* focused on the power of the state courts. It did not consider whether Richard Ridgway had the right to agree, in a negotiated property settlement, to divest himself of some indicia of ownership in this type of property. By implication, however, the Supreme Court has essentially prevented someone like Ridgway from making a binding agreement granting rights in this insurance to his ex-spouse. Because the Court was concerned with the control over the insurance proceeds by the courts rather than by the employee spouse, the issue of the employee's right to transmute these types of benefits—and the proof required to assure that the employee spouse will be held to the transmutation—is not settled by this case.164

The result in *Ridgway* of course diminishes the employee's interest in this type of property. For example, such property will no longer be useful in a divorce settlement, because a properly advised nonemployee spouse would not accept a pledge that could be broken with impunity. As a result, the employee spouse might be forced to purchase new insurance to meet property settlement demands.165

In sum, the spouse seeking to overcome federal preemption of state division of certain federal benefits by transmutation or gift will need to produce convincing evidence that may be especially troublesome to obtain. In contrast, the spouse seeking to overcome the preemption result by showing that the received benefits are held in a shared title form will have the presumptions and burdens in his or her favor, and the employee spouse will need to prove the existence of an agreement or understanding that the property was to retain its original form. Because couples tend to take title to property in shared ownership form, notwithstanding its classification in the absence of the title, the *Lucas* and *Cademartori* decisions could have a significant impact in returning assets preempted from division to their divisible community status.

163. *Id.* at 61.

164. *Id.* at 63. The Former Spouses' Act includes a provision allowing a binding election to provide an annuity under the military retired pay statutes to a former spouse. Former Spouses' Act, *supra* note 6, § 1003(f)(1), 96 Stat. 730, 736 (1982).

165. 454 U.S. at 82 (Stevens, J., dissenting). It is of interest, but not discussed in the opinion, that Richard Ridgway changed the beneficiary from April Ridgway, his first wife, to a direction that the policy proceeds "be paid as specified 'by law'." *Id.* at 48. Why did he choose this designation instead of simply naming Donna Ridgway, his second wife? Might Richard Ridgway have thought that under this designation the divorce court's decree was part of the "law" in accordance with which the policy proceeds would be paid upon his death?
Conclusion

The decided cases prohibiting division between spouses of future federal pension benefits do not foreclose the division of all assets received as, or traceable to, such benefits. The anti-attachment clause in the Railroad Retirement Act, section 231m, might be read to prohibit division of those received benefits maintained by the employee spouse in a readily withdrawable form. However, such an interpretation requires an overly broad reading of the statute.

The anti-attachment clause of the Social Security Act, in contrast, is likely to prevent division between spouses of received benefits held in a readily withdrawable form. The complexity of untangling assets of mixed origin should convince the courts not to apply the pre-emption doctrine to benefits received from social security that are held other than in readily withdrawable form. The case law suggests that division will depend on asset form at the time of divorce.

To the extent that the new legislation leaves open for some couples the question of the reach of preemption in division of received military retired pay, the McCarty precedent is still alive. The McCarty analysis is so broad that it could encompass received as well as future benefits, regardless of the form in which those benefits are held. The Court's "personal entitlement" analysis has no logical endpoint.

State law doctrines of transmutation, gift and presumptions from form of title might allow circumvention of the preemption result in particular cases. These avenues for avoiding preemption results are available in regard to received benefits as well as future benefits.

The preemption of state law division of assets and the entitlement to their future receipt raise a serious social policy issue. In many marriages the pension is the most valuable asset earned during the marriage. Yet one spouse, usually the wife, has no right or only limited right to future pension benefits and may have no right to benefits already received from that source. Congress' bold step to remedy this problem for ex-spouses of military service members should be repeated.

Railroad retirement and social security benefits should be fully subject to division under state law, as will be all military retired pay.

166. See supra note 30.
167. See supra note 35.
168. See supra text accompanying notes 35-43 & 83-86.
169. See supra text accompanying notes 108-18.
170. See supra text accompanying notes 131-65.
The duration of marriage requirement in the Social Security Act should be eliminated; equitable property division should apply in brief as well as lengthy marriages.

The administrative burdens of responding to court orders for division of pension benefits can be avoided in regard to social security, as in the Uniformed Services Former Spouses' Protection Act, by retaining a duration-of-marriage requirement solely as a prerequisite to direct distribution of the benefits to an ex-spouse.173 With respect to the social security system, complete elimination of federal preemption of state marital property law should encourage Congress to give serious consideration to restructuring the system so that covered quarters of social security retirement credits are divided between spouses at the time that they are earned. Then at the time of divorce no division would be required.174

Legislators should recognize the potential difficulty of classifying benefits received from federal pension plans. Legislation to eliminate preemption in respect to future benefit distributions also needs to refer to received benefits. The necessary provision could simply state, “Benefits received under this plan before or after the effective date of this amendment shall be treated by a court at the time of divorce as the property of a pension recipient and his or her spouse in accordance with the law of the jurisdiction of such court.” The Uniformed Services Former Spouses’ Protection Act should be amended in this fashion.175 To eliminate the lottery-like impact of anti-attachment clauses, under which classification and distribution may depend upon the form in which received benefits are held at the time of divorce,176 the provision should continue, “Notwithstanding any other provision of law, all benefits received hereunder shall be subject to distribution in accordance with the law of the jurisdiction of such court.”

Since forty states have some form of equitable distribution of marital wealth, and eight others have community property systems, the recognition of joint spousal contribution to the family wealth at the

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171. Former Spouses' Act, supra note 6, § 1006(c)(1), 96 Stat. 730 (1982).
172. See supra note 5.
175. That Act should also be amended to assure that state law will be fully applicable to the division of active duty pay on hand at divorce. See supra note 110.
176. See supra notes 35-43 & accompanying text.
177. See supra note 17.
178. See supra note 12.
time of divorce is the clearly prevalent policy in this country. The federal government, which has deferred to the states on matters of family law, should defer to this family law policy and conform all federal law to the principles desired by the vast majority of the states and their citizens.